Decision 02-04-067 April 22, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.	Rulemaking 02-01-011 (Filed January 9, 2002)

ORDER GRANTING LIMITED REHEARING ON THE SWITCHING EXEMPTION ISSUE, MODIFYING DECISION (D.) 02-03-055 TO CLARIFY CERTAIN ISSUES RELATED TO COST-SHIFTING AND TO MAKE MINOR CORRECTIONS, AND DENYING REHEARING OF THE DECISION, AS MODIFIED, ON ALL OTHER ASPECTS.

I. SUMMARY

The Commission issued Interim Opinion Suspending Direct Access [Decision (D.) 01-09-060] (2001) ___ Cal.P.U.C.2d __ (hereinafter, "D.01-09-060"), in compliance with the mandates concerning direct access in Assembly Bill No. 1X ("AB 1X").[1] D.01-09-060, an interim order that became effective September 20, 2001, suspended the right to enter into new contracts or agreements for direct access after September 20, 2001. We reserved for subsequent consideration matters related to the effect to be given to contracts executed or agreements entered into on or before the effective date, including renewals. D.01-09-060 especially put parties on notice that the decision could be modified to adopt an earlier suspension date, including a July 1, 2001 date. (Id. at pp. 8-9; see also, Order Modifying Decision (D.) 01-09-060, and Denying Rehearing, As Modified [D.01-10-036, pp. 1-2 (slip op.)] (2001) ___ Cal.P.U.C. ___ (hereafter, "D.01-10-036").)

[1] Stats. 2001 (1st Extraordinary Sess.), ch. 4, §4, p. 10. AB 1X was enacted as an urgency measure to respond to the energy crisis affecting all retail end users statewide.

On January 14, 2002, we issued Order Instituting Rulemaking (R.) 02-01-011 to consider the pending issues in Application (A.) 98-07-003, A.98-07-006 and A.98-07-026 ("A.98-07-003, et al.") These issues involved the consideration for an earlier suspension date, the effect to be given to certain provisions, e.g., renewals, assignments, transfers, and/or add-ons, in contracts executed or agreements entered into prior to September 21, 2001, and other implementation issues concerning the suspension of direct access. (R. 01-02-011, pp. 4-5.)

In D.02-03-055, we addressed these issues in the rulemaking. In that decision, we did not adopt an earlier suspension date for direct access, but determined that it was appropriate to consider the adoption of a direct access surcharge or exit fee ("surcharge"), in lieu of an earlier suspension date. (D.02-03-055, p. 13.) The decision permitted renewals and assignments. (D.02-03-055, p. 18.) It also allowed direct access customers to choose a new ESP and continue on direct access even if they had returned to bundled service after September 20, 2001, but subject to some restrictions. (D.02-03-055, p. 21.) We also refused to allow a customer to opt-into a community aggregation program after the suspension date. (D.02-03-055, p. 24.)

Three parties timely filed applications for rehearing of D.02-03-055. The parties were The Utility Reform Network ("TURN"), The City of Cerritos ("Cerritos"), and California Industrial Users ("CIU").

In its rehearing application, TURN alleges that the Commission in D.02-03-055 violates: (1) Water Code Section 80110, by permitting the renewal and assignment of direct access contracts, and permitting customers who signed a direct access contract prior to September 20, 2001 to switch back and forth between bundled service and direct access; (2) AB 1X, because it does not guarantee that DWR power will be allocated on a pro rata basis amongst all customer classes as required under Water Code Section 80002.5; (3) Public Utilities Code Sections 453 and 451, because the Commission allegedly fails to protect against cost shifting to bundled service customers, and thus, the rates would be unjust and unreasonable; (4) Public Utilities Code Sections 367(e), 367.7(d) and 368(b), by failing to explicitly affirm that direct access customers, or the

customer class to which they belong, are fully responsible for the statutorily required share of transition costs collected by PG&E and SCE through the end of the rate freeze; (5) Public Utilities Code Section 367(a)(2) that requires the Commission to assess three distinct categories of post-rate freeze utility costs from direct access customers after March 31, 2002; and (6) Public Utilities Code Section 1757, by failing to justify key factual findings, and setting forth contradictory statements with respect to protections against cost-shifting for bundled service customers.

In its rehearing application, Cerritos asserts that the Commission erred by: (1) holding that Public Utilities Code Section 366(b) governs the treatment of community aggregation programs, (2) failing to determine the correct "opt-in" date under the Cerritos' community aggregation program; (3) denying the ability of residential customers within Cerritos' jurisdiction to exercise their vested rights to purchase electricity from Cerritos, in violation of Public Utilities Code Section 366(b); and (4) by failing to define what constitutes an "existing arrangement" for direct access service, and thus, has violated Cerritos' due process.

In its rehearing application, CIU requests certain modifications that it believes are necessary to correctly reflect the California statutory law regarding the status of the suspension of direct access. CIU argues that failure to adopt these modifications makes D.02-03-055 legally defective.

Responses were filed to each of these rehearing applications. The Alliance for Retail Energy Markets and the Western Power Trading Forum ("AREM"); California Manufacturers & Technology Association, California Industrial Users, and California Large Energy Consumers Association (collectively, "CM&TA"); The Building Owners and Managers Association of California ("BOMA"); the City of Corona; The Irvine Company; Los Angeles Unified School District ("LAUSD"); San Diego Gas and Electric Company ("SDG&E"); and University of California and California State University ("UC/CSU") files responses in opposition to TURN's rehearing application. SDG&E and Southern California Edison Company ("Edison") filed responses opposing Cerritos'

application for rehearing. AREM filed a response in support of CIU's application for rehearing.

The instant decision resolves the applications for rehearing of D.02-03-055, filed by TURN, Cerritos and CIU. We have carefully considered those applications and the responses thereto. As specified below, we will grant a limited rehearing on the "switching exemption" issue raised by TURN. However, the other allegations raised by TURN do not establish good cause for rehearing. Therefore, except for the "switching exemption" issue, TURN's application for rehearing is denied in all other respects. Also, the arguments raised in the applications for rehearing filed by Cerritos and CIU do not establish good cause for rehearing, and thus, are denied. While we conclude that rehearing is not warranted, except on the "switching exemption" issue, we modify D.02-03-055, to clarify our intent regarding the cost-shifting and related issues and to make minor corrections, for the purposes and in the manner set forth below.

II. DISCUSSION

(1) D.02-03-055 will be modified to make clear the Commission's position regarding cost-shifting and bundled service customer indifference with the adoption of surcharges in lieu of an earlier suspension.

The one theme running through TURN's application for rehearing is a concern that the language in D.02-03-055 does not demonstrate, or is inconsistent with, the Commission intent to prevent cost-shifting and to ensure that bundled service customers will be indifferent with the adoption of a surcharge approach in lieu of an earlier suspension. TURN's concern is unwarranted. In D.02-03-055, we expressly stated our intent to prevent cost-shifting and to ensure that the surcharges be fully compensable so that direct access customers pay their fair share of costs. In the decision, we explicitly said:

- "More importantly, the question is how the Commission will prevent cost-shifting of a significant magnitude." (D. 02-03-055, p. 10.)

- "At this time we will state that direct access surcharges, exit fees or similar charges should be imposed, and it is our intent that such fees or charges be fully compensable so that direct access customers pay their fair share of DWR costs."(D.02-03-055, p. 12.)

- "We emphasize that the direct access surcharges or exit fees to be developed in A.00-11-038 must alleviate any significant cost-shifting, and must be adopted in a timely manner, in order to ensure an overall equitable outcome. Should either of these conditions fail to develop, we will not hesitate to reopen this proceeding to reconsider the suspension date for direct access." (D.02-03-05, p. 16.)

- "It is reasonable to prevent this cost-shifting by imposing a direct access surcharge or exit fee, rather than adopting an earlier suspension. (D.02-03-055, p. 28 [Finding of Fact No. 4.].)

- "Direct access surcharges or exit fees shall be developed in A.00-11-038, et. Al. so that there is an equitable allocation of the DWR costs, so that direct access customers pay their fair share of DWR costs. (D.02-03-055, p. 31 [Ordering Paragraph No. 3.].)

We do not specifically use the phrase "to ensure bundled service customers indifference." Although we do not believe it constitutes legal error for the decision not to contain these words, we will modify D.02-03-055 to incorporate this phrase, or language that is similar. Further, to avoid any further misunderstanding or ambiguity regarding our intent to prevent cost-shifting and to ensure that bundled service customers are indifferent with the adoption of surcharges in lieu of an earlier suspension, we will clarify D.02-03-055 in the manner set forth in the ordering paragraphs below.[2] This includes changing the word "alleviate" to "prevent" and deleting Footnote 7 in the decision.

[2] As discussed below, we will also modify D.02-03-055 to elaborate on the type of costs that may be considered in developing a surcharge, including DWR costs and non-DWR costs.

(2) Contrary to TURN's assertion, the Commission lawfully permitted the renewal and assignment of direct access contracts.

Whether renewals and assignments are lawful depends on an interpretation of AB 1X and in particular, Water Code Section 80110, which provides:

> "After the passage of such period of time after the effective date of this section as shall be determined by the commission, the right of retail end use customers pursuant to Article 6 (commencing with Section 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code to acquire service from other providers shall be suspended until the department no longer supplies power hereunder." (Water Code, §80110.)

In D.01-09-060, we interpreted this statutory provision in AB 1X to mean the suspension of the right to enter into new contracts, agreements or arrangements. As we stated in this decision:

> "[W]e issue this interim order in which we suspend the right to enter into new contracts or agreements for direct access effective today. This decision prohibits the execution of any new contracts for direct access service, or the entering into, or verification of, any new arrangements for direct access service pursuant to Public Utilities Code Sections 366 or 366.5, after the effective date of this order. . . . In other words, effective today, no new contracts or agreements for direct access service may be signed . . . ." (D.01-09-060, pp. 8-9.)

In terms of renewals or assignments, courts have generally viewed such provisions as part of existing contracts, rather than new contracts, especially in the context of whether there is an impairment of contract. (See generally, Danekas v. Residential Rent Stabilization and Arbitration Bd. (2001) 95 Cal.App.4th 638, 650-651 [assignment of preexisting rental agreements and contract impairment], citing

Calfarm Ins. Co. v. Deukemejian (1989) 48 Cal.3d 805, 830 [right of insurers to cancel or non-renew a policy].)[3]

Therefore, renewals and assignments, if they were provisions in contracts entered into or agreements made prior to September 21, 2001, are not new contracts, agreements or arrangements, and thus, are permissible under the interpretation of AB 1X that we set forth in D.01-09-060.

In D.02-03-055, we stated that permitting renewals and assignments is "consistent with our policy for imposing direct or exits [sic] fees, in lieu of an earlier suspension date, as an appropriate way to alleviate the significant cost-shifting of DWR costs on to bundled service customers." (D.02-03-055, p. 18.) In its rehearing application, TURN argues that absent a commitment that the surcharges "will leave bundled service customers indifferent," the Commission's conclusions are flawed. (TURN's Application for Rehearing, p. 5.) This argument has little merit for the reasons stated above, and with our modifications to D.02-03-055 which make clear our intent that the surcharges must prevent cost-shifting and ensure bundled service customers indifference.

(3) A limited rehearing is granted on the exemption that permits customers who signed a direct access contract prior to September 20, 2001 to switch back and forth between bundled service and direct access.

In D.02-03-055, the Commission creates an exemption to D.01-09-060 by permitting direct access customers to choose a new ESP and continue on direct access even if they had returned to bundled service after September 20, 2001, but

[3] However, we note that if a renewal or assignment changes any material terms (e.g., load) in an existing contract or agreement that was entered into before the suspension date, then the renewal or assignment would constitute a new contract or agreement that would be prohibited. Accordingly, in D.02-03-055, we limited the assignment to "the same load at the same location." (D.02-03-055, p. 23.) We intend that this same limitation apply to renewals. We will modify to D.02-03-055 to state that this limitation applies to a renewal.

subject to some restrictions.[4] (D.02-03-055, p. 21.) We will call this exemption the "switching exemption".

In its rehearing application, TURN argues that the "switching exemption" is unlawful and challenges the basis for this exemption. (TURN's Application for Rehearing, pp. 6-7.) After some consideration of TURN's arguments, we believe that a rehearing on this issue is warranted. We will grant a limited rehearing so that this exemption can be considered further in light of AB 1X and D.01-09-060, and to develop an adequate record for such an exemption, as required. The limited rehearing on this issue will be made part of the pending proceeding on the surcharges.

(4) The Commission did not violate Water Code Section 80002.5.

TURN asserts that the Commission has violated Water Code Section 80002.5 because it has not allocated DWR costs pro rata among all classes of customers. (TURN's Application for Rehearing, pp. 8-10.) This assertion has no merit.

In its rehearing application, TURN erroneously concludes that we have in fact allocated DWR costs between bundled service customers and direct access customers. In D.02-03-055, we did not allocate any costs between customer classes or customers within a class. Rather, we set forth a mandate that any surcharge that is adopted must prevent any serious cost-shifting problems. The issue of allocation is still pending before the Commission in the proceeding that will determine the appropriate surcharges, so that direct access customer will pay their fair share.

Further, we have already interpreted this statutory section as not "requiring any particular revenue allocation approach as a matter of law." (Application of Southern California Edison Company for Authority to Institute a Rate

[4] On page 25 of D.02-03-055, the Commission sets forth a list of those customers or types of new locations or loads that are ineligible to move from bundled service to direct access. (D.02-03-055, p. 25.)

Stabilization Plan Etc. ("DWR Revenue Requirement Decision") [D.02-02-052, p. 56 (slip op.) (2002) ___ Cal.P.U.C.2d ___.) In D.02-02-052, we stated that Water Code Section 80002.5 applied to the allocation of power, rather than costs, on a pro rata basis. (Id.) We explained that the purpose of this statute was to ensure that DWR supply all customer classes with power on pro rata or proportionate basis, so that no one customer class would have priority over another. (Id.) Therefore, Water Code Section 80002.5 does not require us to allocate any DWR costs on a pro rata basis.

(5) TURN's arguments that the Commission violated Public Utilities Code Sections 453 and 451 have no merit.

TURN argues that the Commission did not satisfy the requirements under Public Utilities Code Sections 453 and 454, based on a claim that the Commission will likely adopt a surcharge that will result in unreasonable cost-shifting. (TURN's Application for Rehearing, pp. 10-11.) These arguments are without merit.

We have yet to determine what this surcharge will be exactly, and it is a matter pending before us. (D.02-03-055, p. 31 [Ordering Paragraph No. 3.)[5] Thus, TURN's argument as to how the Commission will act is speculative, as well as groundless. In D.02-03-055, we expressed our intent that adopting a surcharge was a reasonable way to prevent the significant magnitude of cost-shifting that might be borne by the bundled service customers if "direct access customers are not required to pay a portion of the costs. . . ." (See D.02-03-055, p. 28 [Findings of Fact Nos. 3 and 4].) In this decision, we also stated:

> "We will determine the level of direct access surcharges to be imposed in that proceeding. At this time we will state that direct access surcharges, exit fees or similar charges should be imposed, and it is

[5] The Commission noted that it made "no findings in this proceeding concerning a specific dollar amounts." (D.02-03-055, p. 12-13, fns. 5 and 6.) There are two footnotes with this same text. We will delete Footnote 5 on page 12.

> our intent that such fees or charges be fully compensable so that direct access customers pay their fair share of DWR costs." (D.02-03-055, p. 12.)

Moreover, we emphasized the need to prevent any cost-shifting problems, by stating:

> "[T]he direct access surcharges or exit fees to be developed in A.00-11-038 must alleviate any significant cost-shifting, and must be adopted in a timely manner, in order to ensure an overall equitable outcome. Should either of these conditions fail to develop, we will not hesitate to reopen this proceeding to reconsider the suspension date for direct access." (D.02-03-055, p. 16.)

We further noted that the issues for this proceeding were not limited to DWR costs but include "[o]ther issues relating to direct access customer cost responsibilities." (D.02-03-055, p. 12, fn. 8.)

Thus, until the Commission determines exactly what the surcharge will be, TURN's arguments about a unlawful cost-shifting and violations of Public Utilities Code Sections 451 and 453 are speculative. Moreover, these arguments are also groundless in light of the Commission's stated position in D.02-03-055 and the clarifications we make to this decision today to ensure that the adoption of the surcharges will not result in cost-shifting and will ensure bundled service customers indifference.

(6) D.02-03-055 does not violate Public Utilities Code Sections 367(e), 367.7(d) and 368(b).

TURN claims that the Commission has failed to comply with Public Utilities Code Sections 367(e), 367.7(d) and 368(b), because it has not explicitly affirmed that direct access customers, or the customer class to which they belong, are fully responsible for the statutorily required share of transition costs collected by PG&E

and SCE through the end of the rate freeze. (TURN's Application for Rehearing, pp. 12-14.) These claims have no merit.

Nowhere in D.02-03-055 are direct access customers relieved from their responsibility for AB 1890 imposed costs, including those transition costs collected by Edison and PG&E during the rate freeze. Thus, contrary to TURN's claims, the Commission has not acted inconsistently with regard to these statutory mandates.

Furthermore, D.02-03-055 provides for other direct access cost responsibility issues to be addressed in the Rate Stabilization Docket, A.00-11-038, et al. The issues regarding cost responsibility of direct access customers, for both DWR costs and non-DWR costs, and issues regarding allocation and calculation, are pending before the Commission in the proceeding that will determine the appropriate surcharges. (See D.01-03-055, p. 12, fn. 8, which indicates that the Commission would consider non-DWR cost issues; see also, Administrative Law Judge's Ruling Setting Procedural Schedule for Direct Access Cost Responsibility Phase ("ALJ's Ruling of March 29, 2002"), A.00-11-038, et al., dated March 29, 2002, pp. 5 & 2-3, which states that in the proceeding, the Commission would be considering "a broad range of costs for inclusion in a direct access surcharge," including but not limited to "the full range of [utilities'] procurement and generation costs attributable to direct access customers.") TURN apparently chose to ignore the parameters set forth in D.02-03-055 and the ALJ's Ruling of March 29, 2002, or at least thought them ambiguous. However, in order to eliminate any possible ambiguity or misunderstanding, we will modify D.02-03-055 so as to make clear that non-DWR costs also will be considered and that direct access customers will be held responsible for such costs as required by AB 1X and other statutes (e.g., AB 1890).

Further, we note that there is nothing to prevent TURN or others from presenting testimony on these costs. As stated in the ALJ's Ruling of March 29, 2002, p. 5:

> "In order to ensure that the Commission is able to consider a fully compensable surcharge, a record must be developed

> that takes into account all possible cost responsibilities including but not limited to DWR purchase power costs. Parties will be expected to address all cost responsibilities of [d]irect [a]ccess customers at the evidentiary hearings. In particular, attention will be focused on how such cost responsibility for [direct access] customers can be formulated."

In citing to Public Utilities Code Section 367.7(d), TURN refers to matters involving the PX credit. Issues regarding the PX credit are still pending before the Commission in A.98-07-003, et al. (See R.02-01-011, pp. 5-6, which separated the issues concerning the suspension of direct access and its implementation from the issues involving the PX credit.) Thus, issues involving the PX credit will be considered in that proceeding and not in the proceeding involving the surcharges at this time.

In its rehearing application, TURN raises an argument about possible costs related to the Edison Settlement and the Commission's PG&E Bankruptcy Plan, and asserts that direct access customers should pay their fair share of such costs. (TURN's Application for Rehearing, pp. 14-16.) The issues concerning costs related to the Edison Settlement are matters for the proceeding on the surcharges. We were not required to dispose of these issues in D.02-03-055. With respect to the Commission's PG&E Bankruptcy Plan, TURN's argument is premature. If and when there are such costs, we will then determine what the cost responsibility may be for direct access customers.

(7) D.02-03-055 does not violate Public Utilities Code Section 367(a)(2) that requires the Commission to assess three distinct categories of post-rate freeze utility costs from direct access customers after March 31, 2002.

TURN asserts that because we failed to reference any post-rate freeze utility costs that must be collected under Public Utilities Code Section 367(a)(2), we must have violated this statutory provision. This assertion has no merit.

In D.02-03-055, we did not relieve direct access customers from any ongoing post-rate freeze transition costs. Further, we were not required to address this issue in the proceeding suspending direct access. Thus, accordingly, we did not act inconsistent with Public Utilities Code Section 367(a)(2).

Furthermore, and as discussed above, D.02-03-055 provides for other direct access cost responsibility issues to be addressed in the Rate Stabilization Docket, A.00-11-038, et al. The issues regarding cost responsibility of direct access customers, for both DWR costs and non-DWR costs, and issues regarding allocation and calculation, are pending before the Commission in the proceeding that will determine the appropriate surcharges. (See D.01-03-055, p. 12, fn. 8; see also, Administrative Law Judge's Ruling Setting Procedural Schedule for Direct Access Cost Responsibility Phase ("ALJ's Ruling of March 29, 2002"), A.00-11-038, et al., dated March 29, 2002, pp. 5 & 2-3.) Therefore, the proper proceeding to raise this issue is the proceeding on the surcharges.

However, as stated above, we will modify D.02-03-055 to make clear the recovery of non-DWR costs also will be considered and that direct access customers will be held responsible for such costs as required by AB 1X and other statutes (e.g., AB 1890).

(8) D.02-03-055 contains a reasoned discussion of its determination concerning the cost-shifting issues and its basis for adopting surcharges in lieu of an earlier suspension, as well as legally sufficient findings of fact and conclusions of law that are supported by the record.

TURN challenges the Commission's basis for its determination to reject an earlier suspension and rely on surcharges to address the cost-shifting problems. In D.02-03-055, we determined that "[c]onsumers, regulated utilities and the economy as a whole benefit when the Commission maintains a regular and consistent regulatory program, which affords the predictability necessary to plan investment and budgetary

decisions," and thus, "California is better served by maintaining the September 20, 2001 direct access suspension date and by imposing a direct access surcharge or exit fee, in lieu of an earlier suspension, to recover DWR costs from direct access customers." (D.02-03-055, pp. 13-15 & p. 28 [Finding of Fact No. 5 & 6].) In setting forth this challenge in its rehearing application, TURN appears to be asking us to reconsider these findings with an inference that the record might not support these findings.[6] TURN is wrong.

Contrary to TURN's inference, the record for this rulemaking proceeding supports our determinations, including the findings. Comments from such parties as the Office of Ratepayer Advocates ("ORA"), AREM, California Manufacturers & Technology Association ("CMTA"), California Large Energy Consumers Association ("CLECA"), UC/CSU and the Los Angeles Unified School District provide record evidence.[7] (See D.02-03-055, pp. 13-15, which sets forth the record that we relied on.) Thus, any inference that the record does not support the findings is without merit.

Also, in the guise of challenging D.02-03-055, TURN raises arguments to statements made in a March 25, 2002 letter from Commissioners Brown and Peevey to Senators Bowen, Burton and Sher. (TURN's Application for Rehearing, pp. 18, 20 & 22.) This also includes a discussion regarding the benefits for renewable resource

[6] TURN argues that the Commission has violated Public Utilities Code Section 1757 in that the findings are not supported by substantial evidence in light of the whole record. However, TURN cites to the wrong statute because Public Utilities Code Section 1757 does not set forth the applicable standards for a rulemaking proceeding. Rather, Public Utilities Code Section 1757.1 provides the appropriate standards. Nevertheless, D.02-03-055 complies with the standards in both statutes.

[7] D.02-03-055 indicates on pages 13-15 that CMTA and CLECA filed joint comments. However, this is an inadvertent mistake, and the decision will be modified to correct this minor error. However, the statement on page 15, lines 2 to 5 regarding the growth of direct access load in summer 2001 should only be attributed to CLECA (see CLECA's Comments, dated January, 4, 2002, pp. 5-6, and fn. 1), and thus, the page 15 should be modified accordingly. Official notice was taken of the November 5, 2001 letter referred to in footnote 1 on page 6 of CLECA's Comments, dated January 4, 2002. (See Cover Letter, dated January 6, 2002, accompanying the Draft Decision of ALJ Barnett.)

development. Any challenge to statements in this letter, that is not part of the Commission's formal decision or the record, is improper, and should not have been made in an application for rehearing of D.02-03-055. Consequently, we do not intend to address these arguments regarding statements made in this March 25 letter.

(9) The Commission did not err in not permitting customers to opt-in to community aggregator programs after September 20, 2001.

During the proceeding, community aggregators, such as Cerritos, sought Commission approval for customers to opt-in to direct access service after the suspension date that was adopted in D.01-09-060. In D.02-03-055, we determined that such opting-in was prohibited. Because Public Utilities Code Section 366(b) required an "opt-in" by interested customers into community aggregation programs, we concluded that the act of opting-in after the suspension date constituted a new arrangement prohibited by D.91-09-060.

In its application for rehearing, Cerritos challenges this determination. It argues that the Commission has misinterpreted Public Utilities Code Section 366(b) and ignored Public Utilities Code Section 366(c). (Cerritos' Application for Rehearing, pp. 3-7.) Further, Cerritos asserts that the Commission erred in denying the ability of residential customers within Cerritos' jurisdiction to exercise their alleged vested rights to purchase electricity from Cerritos, in violation of Public Utilities Code Sections 366(b) and (c). (Cerritos' Application for Rehearing, pp. 7-9.) It also claims that the Commission has acted inconsistently with its findings in D.01-09-060 concerning the continuance of "existing arrangements" for direct access service. (Cerritos' Application for Rehearing, pp. 9-10.)

Cerritos interprets the term "existing arrangement" used in D.01-09-060 to mean that a community aggregation program constitutes an "existing arrangement." (Cerritos' Application for Rehearing, pp. 9-10.) Because the city adopted an ordinance (No. 832) on June 28, 2001 that made the act of opting-in by a customer effective as of

that date, Cerritos argues that any customer choosing direct access service after the suspension date had an "existing arrangement" within the meaning of D.01-09-060.

We find Cerritos' interpretation flawed. The term "existing arrangements" in D.01-09-060 encompasses those customers who had "opted-in" before the suspension date, and not those who had not. Cerritos argues that Public Utilities Code Section 366(b) did not have an opt-in requirement. This argument is wrong. Public Utilities Code Section 366(b) states:

> "Aggregation of customer electric load shall be authorized by the [C]ommission for all customer classes, including, but not limited to small commercial or residential customers. Aggregation may be accomplished by private market aggregators, cities, counties, special districts or on any other basis made available by market opportunities and agreeable by positive written declaration by individual customers." (Pub. Util. Code, §366, subd. (b), emphasis added.)

Clearly, the statute required customers who wanted to be served by a community aggregation program to affirmatively "sign-up" or "arrange" to acquire such direct access service, namely "opt-in".[8] Thus, acquiring such direct access service after September 20, 2001, would constitute a "new arrangement" that was not permitted by D.01-06-060. In that decision, the Commission prohibited "the execution of any new contracts for direct access service, or the entering into, or verification of, any new arrangements for direct access service pursuant to Public Utilities Code Section 366 or 366.5, after the effective date of this order." (D.01-09-060, pp. 8, 10 [Conclusion of Law No. 3] & 13 [Ordering Paragraph No. 4] (slip op.).)

Cerritos' attempt, through the adoption of Ordinance No. 832, to predate the opt-in date of those who agreed to take direct access service from the community aggregation program after September 20 has no legal effect, because it is an act

[8] The fact that public agencies that serve customers within their jurisdiction are exempted from the verification rules set forth in Public Utilities Code Section 366.5(d) does not eliminate the "opt-in" rule specified in Public Utilities Code Section 366(b).

inconsistent with Public Utilities Code Section 366(b), AB 1X and Commission authority to determine the date of the suspension.

Cerritos asserts that, as a charter city, it had authority under Sections 5 ("Home Rule" doctrine) and 7 of Article XI in the California Constitution to adopt Ordinance No. 832, which made June 28, 2001, the effective date for any opt-in. Cerritos also states that it had the authority to choose the effective date of June 28, 2001, because Public Utilities Code Section 394.4 authorizes the governing board of the public agency to determine the general rules for aggregation services provided to residential and small commercial customers within its jurisdiction. (Pub. Util. Code, §394.4.)

Cerritos' assertions would be correct, but for the fact that Ordinance No. 832 conflicts with the general laws of the State. Under the California Constitution, a local law that conflicts with state law is invalid. (See Cal. Const., art. XI, §7; see also, Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 897.) "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. . . . A conflict exists if the local legislation ' "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implications." ' (Citations omitted.)" (Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal.3d 878, 885.) The ordinance in question conflicts with the requirements in AB 1X for the suspension of direct access on a date determined by us, and not Cerritos. The ordinance attempts to circumvent the exercise of our authority to suspend direct access on a certain date, and thus, is improper.[9] The suspension of the right to acquire direct access and the date of that suspension is a matter for the State's regulation through this Commission's implementation of AB 1X. Thus, the provision in Ordinance No. 832 predating the effective date of an opt-in is not valid.

[9] Even Cerritos acknowledges that the city passed the ordinance to establish "a Community Aggregation Program . . . before the impending decision of the California Public Utilities Commission." (Ordinance No. 832, City of Cerritos, June 28, 2001, p. 2.)

Further, the enactment of Public Utilities Code Section 394.4 did not give public agencies, such as Cerritos, the right to act inconsistently with the general law of the State based on the Home Rule doctrine set forth in Section 5 of Article XI of the California Constitution. Cerritos is wrong that this statute made the city's adoption of rules for its community aggregation program solely a "municipal affair," and permitted it to adopt Ordinance No. 832. The statute does not, especially in light of the Legislature's enactment of AB 1X, which affects direct access statewide. "It is settled that the constitutional concept of municipal affairs is not a fixed or static quantity. It changes with the changing conditions upon which it is to operate. What may at one time have been a matter of local concern may at a later time become a matter of state concern controlled by the general laws of the state." (Pacific Telephone and Telegraph Company v. City and County of San Francisco (1959) 51 Cal.2d 766, 771 & 774; see also, California Apartment Association v. City of Stockton (2000) 80 Cal.App.4th 699, 709, stating that "the specific regulatory power over public utilities granted under article XII [of the California Constitution] supersedes a claim to the same under the theory that it is a matter of municipal affairs.")

Also, Cerritos is wrong that the residents and businesses under its jurisdiction have a "vested right" in receiving direct access under Public Utilities Code Section 366(b) and (c). There is no such constitutional right, and Cerritos cites to no constitutional provision. Rather Cerritos had a statutory right under these code sections that was permissibly changed by the Legislature with its enactment of AB 1X. The statute provided for the suspension of "the right of retail end use customers pursuant to Article 6 (commencing with Section 360) of Chapter 2.3 of Part 1 of Division 1 of the Public Utilities Code to acquire service from other providers," . . . "until the [DWR] no longer supplies power," and authorized the Commission to determine the date of suspension. (Pub. Util. Code, §80110, emphasis added; see also, Stat. 2001, (1st Extraordinary Sess.), ch. 4, §4, p. 10.) Therefore, when the Legislature suspended the right of customers to acquire direct access, the suspension also affected

the provisions of Public Utilities Code Section 366(b) and (c). No exceptions were made for community aggregator programs.[10]

In its rehearing application, Cerritos focuses on the following language in D.01-09-060: "[t]he effect to be given to . . . arrangements made for direct access service before today . . . will be addressed in a subsequent decision." Cerritos relies on this language to argue that D.01-09-060 does not preclude customers from opting-in after September 20, 2001, because of the existence of the community aggregation program prior to the suspension date adopted in D.01-09-060, and the earlier effective date given by Ordinance No. 832. Cerritos' reliance is misplaced. The language was intended to reserve for Commission consideration the effects of renewals, assignments, add-ons, and other provisions in existing "direct access contracts executed, agreements entered into or arrangements made." (See Assigned Commissioner's Ruling of October 23, 2001, in A.98-07-003, et al, p. 3, defining the scope of the proceeding.) If a customer had not opted-in prior to the suspension date, it did not have an "existing arrangement," within the meaning of D.01-09-060. As discussed above, it is clear that the existence of the community aggregation program without an affirmative customer opt-in did not constitute "an existing arrangement," especially under the requirements of Public Utilities Code Section 366(b).

(10) D.02-03-055 correctly set forth the statutory requirements for the suspension of direct access mandated by AB 1X.

In its application for rehearing, CIU asserts that the Commission misstates the statutory requirement for suspension of direct access under AB 1X, as codified in Public Utilities Code Section 80110, because Conclusion of Law No. 2 and Ordering Paragraph Nos. 2, 6, 7, and 9 do not contain language to the effect that the suspension

[10] Public Utilities Code Section 366(c) requires that Cerritos to offer its program to all residents. The suspension of direct access does not create a discrimination problem. So long as Cerritos offered its program to all of its residents prior to the suspension date, it would have been in compliance with Public Utilities Code Section 366(c).

of access is only "until the DWR no longer supplies power." CIU's assertion is without merit.

In D.02-03-055, p. 3, we quote verbatim Public Utilities Code Section 80110, including the following language: "the right of retail end use customers . . . to acquire service from other providers shall be suspended until the department [the Department of Water Resources] no longer supplies power hereunder." Accordingly, D.02-03-055 correctly states the law on the status of direct access.

Just because the conclusion of law and the ordering paragraphs cited by CIU do not contain this language does not constitute a misstatement of the law. D.02-03-055 is about the Commission's determination of a suspension date and the implementation of this suspension date, and not the termination date of the suspension. The latter will be a subject for the Commission consideration in the future. Therefore, there is no legal error in not including this language in the conclusion of law or ordering paragraphs. Accordingly, CIU's rehearing application should be denied.

However, we will treat CIU's rehearing application as a request for clarification, and modify D.02-03-055 to preclude any possible ambiguity regarding the suspension mandate under AB 1X. Conclusion of Law No. 2 will be modified to read as follows: "In implementing AB 1X, the Commission in D.01-09-060 suspended the right to enter into direct access contracts or arrangements after September 20, 2001, until the DWR no longer supplies power under the provisions of AB 1X." Further, Ordering Paragraph No. 7 will be modified to state: "If not already done, SCE, PG&E, and SDG&E shall modify any information disseminated to customers that describes direct access service, subject to review by the Public Advisor's office and Energy Division, to explain that the right to acquire direct access service has been suspended until DWR no longer supplies power under the provisions of AB 1X." We make this modification to the ordering paragraph so that any information distributed to the public contains precise language about the suspension.

We will not modify Ordering Paragraphs Nos. 2, 6, and 9, as suggested by CIU, because these ordering paragraphs do not constitute specific statements about the

AB 1X. Rather they are about the implementation of the suspension date by the utilities.

III. CONCLUSION

For the reasons discussed above, we will grant a limited rehearing on the "switching exemption" issue raised by TURN. However, the other allegations raised by TURN do not establish good cause for rehearing. Therefore, except for the "switching exemption" issue, TURN's application for rehearing is denied in all other respects. Also, the arguments alleged in the applications for rehearing filed by Cerritos and CIU do not establish good cause for rehearing, and thus, are denied. While we conclude that rehearing is not warranted, except on the "switching exemption" issue, we will modify D.02-03-055, to clarify our position on the cost-shifting and related issues, and to make minor corrections, for the purposes and in the manner discussed above.

THEREFORE, IT IS ORDERED that:

1. D.02-03-055 shall be modified to clarify certain issues related to cost-shifting and to make minor corrections, in the manner set forth above. D.02-03-055 shall be modified as follows:

   a. On page 10, line 19, the phrase "to alleviate this serious concern of cost-shifting," shall be rewritten to state: "to prevent this serious cost-shifting".

   b. On page 11, Footnote 5 shall be deleted to remove an inadvertent redundancy, and the subsequent footnotes should be renumbered accordingly.

   c. The last sentence of the second full paragraph on page 12 should be modified to read as follows:

      > "At this time we state that direct access surcharges, exit fees or similar charges should be imposed, and it is our intent that such fees or charges be fully compensable so that direct access customers pay

their fair share of DWR costs, and bundled service customers are indifferent.

d. On page 12, Footnote 7, which states the following, shall be deleted:

> "In A.00-11-038, et. Al., the Commission will also determine whether direct access customers who did not take bundled service between January 17, 2001 and September 20, 2001 may be exempt from exit fees."

e. Footnote 8 on page 12 shall be modified to read as follows:

> "Other issues relating to direct access customer cost responsibilities may also be considered in A.00-11-038, et al. Thus, issues involving direct access customer responsibilities for non-DWR costs, including those required by AB 1X and other statutes (e.g. AB 1890) may also be raised in that proceeding."

f. The reference to "CMTA/CLECA," shall be changed to read "CMTA, CLECA," on pages 13, line 8 and page 14, line 13.

g. The reference to "CMTA/CLECA" on lines 2 and 5 of page 15 shall be change to "CLECA".

h. On page 16, line 4 and on page 18, line 16, the word "alleviate" shall be replace by the word "prevent".

i. The first sentence of the first full paragraph on page 16 shall be modified to read as follows:

> "We emphasize that the direct access surcharges or exit fees to be developed in A.00-11-038 must prevent any significant cost-shifting, and must be adopted in a timely manner, in order to ensure an overall equitable outcome, and make bundled service customer indifferent."

j. On page 23, line 17, a footnote shall be added at the end that sentence that reads: "Assignment to a new customer is limited to the

same load at the same location." The footnote text shall read as follows: "This same limitation shall also apply to renewals."

k. Finding of Fact No. 4 on page 28 shall be modified to read as follows:

> "It is reasonable to prevent this cost-shifting by imposing a direct access surcharge or exit fee, rather than an earlier suspension, so that bundled service customers are indifferent to the approach taken by the Commission today."

l. On page 30, Conclusion of Law No. 2 shall changed to read as follows:

> "In implementing AB 1X, the Commission in D.01-09-060 suspended the right to enter into direct access contracts or arrangements after September 20, 2001, until the DWR no longer supplies power under the provisions of AB 1X."

m. Ordering Paragraph No. 3 on page 31 shall be changed to read as following:

> "Direct access surcharges or exit fees shall be developed in A.00-11-038, et al. so that there is an equitable allocation of the DWR costs and other costs that may be considered, and that direct access customers pay their fair share of DWR costs and non-DWR costs and bundled service customers are indifferent.

n. On page 31, Ordering Paragraph No. 7 shall be modified to state:

> "If not already done, SCE, PG&E, and SDG&E shall modify any information disseminated to customers that describes direct access service, subject to review by the Public Advisor's office and Energy Division, to explain that the right to acquire direct access service has been suspended until DWR no longer supplies power under the provisions of AB 1X."

2. Cerritos' Application for Rehearing of D.02-03-055 is hereby denied.

3. CIU's Application for Rehearing of D.02-03-055 is denied.

4. A limited rehearing is granted on the switching exemption issue, so that this exemption can be considered in light of AB 1X and D.01-09-060, and to develop an adequate record on this exemption, as required.

5. The limited rehearing on the switching exemption issue shall be part of the pending proceeding on the surcharges.

6. Except as provided above, TURN's Application for Rehearing of D.02-03-055 is hereby denied in all other respects.

This order is effective today.

Dated April 22, 2002, at San Francisco, California.

HENRY M. DUQUE
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

I dissent.
/s/ Loretta M. Lynch
President
I dissent.
/s/ Carl W. Wood
Commissioner